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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 153

OLIN MATHIESON CHEMICAL CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

In this brief, the respondent is called "the Board", the three charging unions are called "the Unions", the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, is called "the Act", and petitioner is sometimes called "the Company."

The printed record consists of petitioner's appendix in the court below paged 1-79 inclusive, and respondent's appendix paged separately 1-23 inclusive. Appended to respondent's appendix are the proceedings in the court below, continuing the same paging. Page references to the record are in parentheses; "PA" prefixed indicates petitioner's appendix, "RA" respondent's appendix and the proceedings in the court below, and "R" the typewritten transcript. References to the General Counsel's exhibits are designated "GC Ex.", and to petitioner's exhibits "CO Ex."

(a) THE DECISIONS BELOW

(1) The decision and order of the Board with the intermediate report appended (PA 36-76) are reported at 114 NLRB 486.

(2) The majority and minority opinions of the court below (RA 25-32) are reported at 232 F. 2d 158.

(b) THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Petitioner invokes the jurisdiction of this Court upon the following grounds:

1. (i) By the provisions of U. S. Code, Title 28, Sec. 1254, this Court has jurisdiction to review the decree in question by writ of certiorari.

(ii) The decision of the court below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, involving the same question.

(iii) The court below has decided a question of interpretation of the Act, relative to the right of an employer to replace economic strikers, which has not been, but should be settled by this court on account of its importance in the administration of the Act.

(iv) The court below has erroneously construed and applied Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act.

2. (i) The decree of the court below was dated and entered on April 9, 1956.

(ii) The petition for a writ of certiorari was filed on June 9, 1956.

(c) THE STATUTES INVOLVED

Section 8(a) of the Act defines the unfair labor practices of the employer. The Board has found that petitioner violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act (PA 38, 40). So far as pertinent, these subsections read as follows:

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .
>
> "(5) to refuse to bargain collectively with the representatives of his employees, . . . "

Since Section 8(a)(1) refers to Section 7, we quote the latter to the extent pertinent:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organ-

> izations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

Section 8(d) defines the duty of collective bargaining. It is as follows:

> "(d) for the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

(d) THE QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Was it an unfair labor practice (*absent a contract* and absent evidence of anti-union discrimination or motivation) for petitioner to replace, in order of seniority with respect to future lay-offs, the group of employees who remained out until the end of an economic strike, with employees as a group who either declined to strike or who, having struck, crossed the picket lines and returned to work before the end of the strike, so that the employees who remained out until the end of the strike were placed in a lower seniority group than those then at work, with respect to liability to future lay-offs?

2. Was it a refusal to bargain, for petitioner (*still absent a contract*) to maintain the replacements mentioned in Question No. 1, after bargaining thereon with the Unions to an impasse?

3. Exclusive of Question No. 2, was petitioner otherwise guilty of refusal to bargain, under the facts attending its negotiations with the Unions?

(e) STATEMENT OF THE CASE

1. The Facts

There is no real conflict concerning the facts of this case, which we summarize as follows:

Petitioner is a corporation operating chemical plants situated in several states (GC Ex. 2). This case is concerned with occurrences at its plant in Morgantown, West Virginia, a facility leased to petitioner by the United States for a term ending in 1956 (CO Ex. 4, p. 4), with the privilege of extension for an additional period at the end of the term. Petitioner's operation of the plant began in 1952, when the Unions were certified as bargaining representatives (RA 27). As historical background, the plant was previously operated for the United States successively by other employers and just prior to the lease to petitioner the plant was shut down for more than a year (R 151-4).

Operation for the term ending 1956 was a trial run, at the end of which petitioner's top management would decide whether to exercise its option to extend the lease. The record shows that both the local plant management and many of the employees were deeply concerned to make a production record which would

favorably impress petitioner's top management and cause it to extend the lease and thereby keep the plant in operation (CO Ex. 4, p. 4).

Maintenance employees, numbering approximately 234 (PA 20) were members of the Unions, which represented them in bargaining with petitioner under the Board's certifications. Uniform contracts were in effect (GC Ex. 4(a), 4(b), and 4(c)), including a union shop clause and a no-strike clause. Another labor organization, District 50 United Mine Workers, with a contract, represents the production workers who constitute the bulk of the employees (PA 16-17, 20; RA 4). This Union is not involved in the case here.

The petitioner has no anti-union background (RA 31).

During the fall of 1953, the local plant management became disturbed over the high maintenance costs at the plant (PA 14). Following studies of maintenance problems commenced in October, the local plant manager concluded early in February, 1954, that the maintenance forces were over-staffed. The decision was then made to reduce the number of jobs by 94 (PA 19). The Board does not contend that this decision involved any unfair labor practice, *but concedes that it was economic* (PA 15).

The expiration date of the contracts was February 10, 1954. Despite several weeks of prior negotiation, the parties were unable to reach agreement, primarily because of the Unions' demand for higher wages. Petitioner had taken the position that it was not prepared to grant any wage increase (PA 20, 47). The Federal Mediation and Conciliation Service was

requested by petitioner and Unions jointly to intervene (PA 19-21), and did so (PA 6), but the impasse was not resolved. The contracts expired, before the contemplated layoff was made or announced.

On February 24, 1954, the Unions called a strike to enforce their wage demands (PA 6). The Board makes no contention that the strike was either caused or prolonged by any unfair labor practice, *but concedes that it was entirely economic in character* (PA 47).

The production workers, covered by the District 50 contract, refused to honor the picket lines of the Unions and continued to report to work, thereby keeping the plant in operation (PA 16-17). Essential maintenance work was performed by some of the maintenance employees who either refused to strike or subsequently repudiated the strike and reported for assignment (PA 8-9).

On Monday, March 15, 1954, the plant manager wrote a letter to Radford, principal spokesman for the Unions, notifying him that on Wednesday, March 17th, petitioner would "start to interview applicants for *some of the jobs* which were formerly filled by striking employees" (PA 22). (Petitioner evidently considered it unnecessary to interview applicants to fill *all* the jobs of the strikers, because of its prior decision to make a substantial reduction in force). On receipt of the letter, Radford requested a resumption of negotiations. Petitioner requested him to relay the proposal to the Mediation official who had been in charge of the preceding bargaining conferences (PA 23).

On the evening of March 16, a Citizens' Committee, which the Board concedes had no connection with the management (PA 48), but which had been in touch with Radford, inquired of him whether he would be agreeable, if the Citizens' Committee requested him to do so and negotiations were resumed, to return the strikers to work under the terms of the old agreement (PA 7). Radford immediately, without waiting for such request, directed the remaining strikers to return to work on March 17 (PA 8). This they did without notice to petitioner, and as Radford subsequently stated in a letter, "without any agreement whatsoever" (PA 49).

When the remaining strikers returned to work pursuant to the Unions' instructions, the number of permanent jobs still unfilled was considerably smaller than the number of returning strikers, in view of the previous decision to reduce the maintenance forces by 94. All the men, however, were placed on the payroll, since the composition of the layoff list had not been decided (RA 10). It was completed shortly before March 29 (RA 10).

On March 23, Radford wrote petitioner stating that he had contacted the Federal Mediation Service, that petitioner's negotiator was not then available and that the Unions were now offering to meet to negotiate further on the "unresolved issues" with a view to reaching a written agreement (PA 23-4). Not receiving an immediate answer, Radford wrote again on March 29, stating that in directing the strikers to return "without any agreement whatsoever", he had hoped to demonstrate the sincere desire of the Unions to resolve their issues, but that if petitioner continued to ignore "his efforts to resolve our differences, *the*

alternatives which we may pursue are very limited" (PA 49). On the next day, petitioner acknowledged the March 23 letter and suggested April 2 as the date for the requested bargaining conference (PA 24-5).

Thereupon the conference was held on April 2, at which petitioner proposed the terms of a new contract which it offered to sign. In the course of the meeting, petitioner announced the elimination of the 94 jobs and its intention to retain in permanent jobs the employees who had declined to strike or had returned to work prior to March 17 (the date of the end of the strike), and also announced that its plan was to allocate the remainder of the permanent jobs among the strikers who returned at the end of the strike, in the order of their respective lengths of service in their respective work groups (PA 8-9, 25).

Petitioner at the same conference requested the Unions to agree to inclusion in the contract of a paragraph of the seniority clause reading as follows (PA 25):

> "Anything in this Article IV on seniority to the contrary notwithstanding, employees in the journeyman classification and employees in the Helper Classification within a Work Group covered by this Contract who were not at work from February 25, 1954, until at or after noon on March 17, 1954, shall be laid off before any employee so classified in the same Work Group who remained at or returned to work or was hired during the period from February 25, 1954, to noon March 17, 1954, is laid off."

The contract which petitioner offered to sign also included the clauses previously agreed upon and

contained no provision for any wage increase (PA 8-9).

Characterizing petitioner's proposal as "ridiculous" and "totally unacceptable" (PA 9), Radford, in behalf of the Unions, flatly rejected the contract offer. A spokesman for petitioner suggested that he might like to have five days to think it over, but Radford emphatically stated that even though the offer remained open indefinitely, he "would never agree to it."

Petitioner then gave a week's notice to the individual employees to be laid off (R 22). The reduction in the maintenance work force was made effective on April 9, the order of retention being in accordance with the proposal which the Unions had rejected.

On April 15th or 16th, Radford telephoned, requested a conference, and petitioner asked that he "submit *any new proposal* in writing" (PA 27). On April 20, Radford wrote, proposing an agreement "which would include all clauses tentatively agreed upon prior to the strike," together with a ten-cent wage increase, and requesting a meeting "for the purpose of negotiating further on the unresolved issues" (RA 15). On April 27, petitioner replied, referring to the previous great length of the negotiations and the fact that an impasse had been reached, and declined to meet again merely for further discussions of the issues on which the impasse had developed.

The letter reads in part as follows:

> "We next heard from you on April 15, asking for a meeting to discuss 'the unresolved issues.' We told you that we do not propose to sit in a series of futile meetings repeating our respective

position *and asked that you submit any new proposal in writing.*

"You have now done so. You still propose a wage increase, although we have told you in many meetings over a period of several months that we could not grant a wage increase. You totally ignore the new issues which arose as a result of the strike. Your position is utterly unrealistic. It illustrates the futility of further meetings on questions regarding which we are apparently hopelessly in opposition.

"We are forced to reject the proposals contained in your letter of April 20. It is unnecessary to cite reasons which have been given to you so many times before.

"We see nothing to be gained in a meeting such as you propose. You know our position too well to waste your time and ours in futile discussions of previously rejected proposals" (PA 27).

The Unions did not reply (R 103), and in the following months made no new proposals nor any proposals, and did not request a further meeting (R 103, PA 28).

On February 12, 1955, petitioner approached the Unions, offering the same contracts as on April 2, 1954 (PA 53-4). The Unions replied on February 19, requesting a bargaining conference (PA 54), to which petitioner replied on February 21 (PA 29) suggesting March 3 as the date. The parties then met and petitioner again offered to sign the new contract proposed in its letter of February 12 (R 73). On March 21 (GC Ex. 25), petitioner submitted the complete contracts (GC Ex. 24a, 24b, 24c) for execution. The Unions declined to sign (GC Ex. 26). On April 7th, petitioner wrote that it was "ready and willing to execute the contracts * * *" (PA 32).

After the Board hearing in this case, and before the Board decision, one of the Unions, the Carpenters and Joiners Local 1369, requested further bargaining. Negotiations followed as a result of which petitioner and the Carpenters and Joiners, on June 22nd, agreed to and signed a contract which was the same as petitioner had offered to sign at the March 3, 1955 meeting, with a proviso that if the seniority provision relative to the returned strikers was subsequently held illegal, that paragraph would be deleted (PA 78).

Petitioner moved the Board to receive into the record the evidence of the execution of the new contract, which the Board declined to do (PA 36).

2. The Decision of the Board

The Board found that petitioner's action in assigning priority in job retention to the employees who declined to strike or returned to work before the Union directed the remaining strikers to return, was a violation of Sections 8(a)(1) and 8(a)(3), in that it resulted in including in the layoff certain employees —seven in all—who would have been retained had the seniority provisions of the expired contracts been in effect. In its decision, the Board does not contend that the layoff itself was not justified on economic grounds or that in selecting the persons for layoff, petitioner discriminated between Union and non-Union workers.[1] The Board's factual premise was that it was "not until the strike was over, and all the strikers had been put back to work" that petitioner for the first time put into a senior group for purposes of layoff the non-strikers and those who returned

[1] All of the employees were Union members under the terms of the expiring contracts and so far as the record shows none of them withdrew from membership.

before the Unions called back the strikers.[2] From this premise it reasoned that petitioner's new seniority policy was motivated "not by any legitimate economic interest of its own," but by a desire to punish the workers who engaged in a strike, and a wish to reward those who repudiated the strike. Thus viewed, the Board held that petitioner's actions amounted to a violation of Section 8(a)(3)—a discouragement of Union membership—or of Section 8(a)(1)—interference with the right to engage in concerted activities—and adopted the trial examiner's order requiring petitioner to reinstate seven of the laid off employees with back pay; and to rescind its announced seniority policy, "and to restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy" (PA 41).

The Board also found petitioner guilty of refusing to bargain under Section 8(a)(5). Without specifically holding that the new seniority proposal was illegal *per se*, the Board found bad faith in petitioner's adamant insistence on this clause over a period of a year—a position regarded by the Board as revealing "a bad faith resolve never to come to terms on a written agreement" (PA 39).

3. The Decision of the Court Below

On petition for review, a majority of the Court of Appeals enforced the Board order. The Court relied primarily upon a decision of another Court of

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[2] As we shall point out in our argument, the strike was "over" in a purely figurative sense. No strike settlement or new contract had been agreed to by the Union at the time of the layoff and the Union was still pressing its demands. Accordingly, the Union order to return to work must be viewed as a temporary truce rather than a termination of the strike.

Appeals, *Republic Steel* v. *N.L.R.B.*, 114 F. 2d 820, 821, to the effect that, upon reinstatement, "the striking employees would be treated in all matters involving seniority and continuity of employment as though they had not been absent from work," a decision which it should be noted deals with the rights of *unfair labor practice strikers* and is hence distinguishable from cases involving the right of employers to replace economic strikers.

The Court's chief emphasis, however, was that during the time of the strike petitioner had made no promise to the employees who remained at work or who returned without union permission, that their employment would be permanent. The Court seized upon this fact to distinguish the *Potlatch* case (*N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82), on the ground that in that case the employer advocated "strike seniority" before the strike was settled and adopted that policy at the time of the settlement. The Court also noted that in *Potlatch* the replacements included some new employees, whereas here the replacements were entirely old employees. It would therefore appear that the Court of Appeals would have set aside the Board's order if petitioner had offered permanent tenure during the time the strike was in progress (PA 30).

Circuit Judge Soper dissented on the ground that the *Potlatch* case was not distinguishable in any essential feature and was a "reasonable approach to the problem under consideration."

(f) SUMMARY OF ARGUMENT

The court below and the Board have reached a result which destroys, or at least seriously impairs, the rights which this Court in the *Mackay Radio* case

(*N.L.R.B.* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333) has reserved to employers faced with a labor dispute over economic matters and a strike resulting from such a dispute.

The strikers who *en masse* returned to work on March 17 had, under the Act, a right to be reinstated to their former jobs *only* in the event that such jobs were still in existence and *only* if the petitioner had not replaced them. Because the Company had decided, prior to their return to work, for valid economic reasons, to reduce its work force by 94 jobs, it seems to be abundantly clear that the number of the returning strikers exceeded the number of available jobs by 94. When these employees, therefore, appeared on the Company's premises on March 17, without any prior notice and without any agreement having been reached settling the pending dispute between the Company and the Unions, the Company was faced with the problem of deciding which employees of the entire group would be reinstated to the available jobs and which employees would be laid off.

The Company dealt with the situation in what appears to be a very reasonable manner. Without making any announcement to the strikers or to the Unions, the Company permitted all of these returning strikers to come back into the plant. (Presumably there was a backlog of maintenance work as a result of the three-weeks strike.) Then at the next bargaining conference, held on April 2, the Company informed the Unions of the reduction in force, announced the intended date, April 9, and identified the particular strikers who returned on March 17 who would not be continued on the payroll because of this reduction. The Company, at the conference, discussed the problem

with the Unions and then, when its proposal was rejected, notified the individual employees involved of their impending lay-off.

The April 2 meeting between the Company and the Unions was a conference requested by the Unions to continue the negotiations to settle the still current labor dispute between the Company and the Unions by the execution of an acceptable agreement between these parties. In order that the seniority provision of the new contract with respect to layoffs should not grant the strikers who returned on March 17 rights to "bump" or displace other employees (including former strikers) who were on that date already at work, the Company insisted that any contract settling the current labor dispute contain a provision recognizing that the Company need not lay-off employees who were already at work on March 17 in order to make room for any of the strikers who returned on that date.

The court below and the Board have seized upon this contract provision which the Company proposed, as the sole reason for, and indeed the only evidence to support, their conclusion that the Company illegally laid-off the seven employees for whose benefit the reinstatement and back pay portions of the Board's order are directed.

The court below and the Board have focused their attention solely on the language of the Company's contract proposal dealing with the problem of the allocation of jobs available to the returning strikers on March 17, and on the discouraging effects this contract proposal might have on employees who in the future might wish to exercise their right to strike.

In giving such prominence to this contract proposal, the court and the Board have erroneously arrived at a conclusion which, contrary to the rule noted by this Court in the *Mackay Radio* case, would require the Company to allocate available jobs to returning economic strikers at the expense of non-strikers or of employees hired as replacements or of employees who had earlier abandoned the strike. Further, the Board and the court below have, by this erroneous conclusion, embarked on the even more mischievous course of endowing returning strikers with seniority rights which they clearly did not possess either before the beginning of their strike or thereafter, and which such employees had theretofore enjoyed only through their union contracts.

A. (i) It is petitioner's view that the accommodation which the court made in the *Mackay Radio* case between the employees' right to strike and the employer's right to continue its business, renders invalid the Board's order that the Company here give employment and back pay to 7 employees who returned to work on March 17, but were not reinstated to their former jobs because of the reduction in force.

(ii) The striking employees who returned to work on March 17 were, as economic strikers, entitled to be reinstated to the permanent jobs then available — i.e., the number of jobs at the beginning of the strike less the 94 jobs which the Company had, for valid economic reasons not here in issue, decided to eliminate.

(iii) The Company did not on March 17, reinstate all the strikers who returned to work on that date because there was available at that time an insufficient number of jobs to which they could be reinstated. It

was not, therefore, an unfair labor practice for the Company subsequently to advise them of the predetermined reduction in force, or to insist that the Unions, in any strike settlement agreement, recognize that the returning strikers had no right to "bump" other employees who were on the job on March 17, either as non-strikers, strikers who had earlier been reinstated, or replacements who had been hired during the strike.

B. The Board and the court below erred in drawing the inference that the Company had no "legitimate economic interest" in protecting the employees who were at work on March 17 when the Unions ordered the remaining strikers to return. It is the view of petitioner that the right of the Company to continue to operate its business by maintaining an adequate work force during a strike—the right noted by this Court in the *Mackay Radio* case—did not expire here on March 17 merely because the Unions ordered a return to work *without reaching any settlement with the Company of the labor dispute underlying the strike and without in any way abandoning the objectives of the strike.*

C. It was beyond the authority of the Board and the court below to impose upon the Company and the employees who were working prior to March 17, a seniority policy which required the reduction in the Company's work force to be made by laying off the 94 employees with least length of service on the Company's pre-strike pay-roll, regardless of the fact that some of them as a matter of law, possessed rights to be assigned to the work available inconsistent with this seniority policy of the Board.

D. Petitioner did not fail to bargain in good faith with the Unions, for its contract proposal on seniority was not repugnant to the Act. Accordingly, it had the right to insist upon its incorporation on any contract with the Unions as a method of settling the strike.

(g) THE ARGUMENT

1. Petitioner Had the Right to Retain as Permanent Employees Those Who Were Already at Work When the Rest of the Strikers Returned on March 17

The complainants were economic strikers. It is a settled principle that their only right under the Act upon their abandonment of the strike was to be reinstated to the extent that permanent jobs were then available. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-5. This is the leading case and its application, until the decision of the court below, has never been judicially limited.

In the *Mackay* case, the employees in the company's San Francisco office had struck in an effort to force agreement upon a contract. The employer replaced the strikers with employees transferred from Los Angeles, promising them permanent San Francisco employment if they so desired. Five of them elected to stay. The decision involved the question whether the strikers, upon their return, were entitled to be reinstated to their old jobs then occupied by the replacements. On this question, it was said by this Court:

> ". . . Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although Sec. 13 provides, 'Nothing in this Act shall be construed

> so as to interfere with, or impede or diminish in any way the right to strike', it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them."

In this case, as already seen, the Company before the strike, had decided to reduce the maintenance work force in the near future by eliminating 94 jobs. Thus, on March 17, the date the strikers returned to work en masse under union direction, there were not a sufficient number of jobs available to assure permanent tenure to all the economic strikers. Therefore, it follows that the Company had a right to assign the individual strikers respectively to permanent jobs and temporary jobs on any basis of choice not forbidden by law.

The method petitioner used was to consider all the employees who had remained at work or come back to work before March 17 as already filling permanent jobs, and then to allocate the remaining strikers to permanent jobs in the order of their respective lengths of service until all such jobs were exhausted. The balance of the men were assigned to temporary jobs.

According to the Board, however, it was discriminatory to treat the first group of employees as having permanent tenure, to the exclusion of any of the later returning strikers who might formerly have outranked them on the old seniority list. As we shall hereafter point out, there being no contract in effect at this time, there were no existing seniority rights.

The rights of returning strikers were governed by the principles enunciated by this Court in the *Mackay* case.

The court below attempted to distinguish that case on the ground that here the employees who repudiated the strike had been given no assurance of permanent employment. We submit this makes no difference. What the court overlooked were the numerous Board decisions holding that strike replacements will be deemed permanent replacements unless there is affirmative evidence that they were hired only temporarily. Thus, in *Union Bus Terminal of Dallas, Inc.*, 97 NLRB 206, 208, the Board held that the places of returning economic strikers had been filled, *because "there is no evidence to show that such replacements were not permanent."*

In *Columbia Pictures Corporation*, 64 NLRB 490, 516, a striking union challenged the ballots of a group of employees in a set decorators unit on the ground that they had merely been temporarily employed after the regular employees in the unit had been called out on strike. Many of the replacements were not new employees but had simply been transferred to the unit from other jobs in the same company. Although no promise of permanent tenure had been given any of the replacements, the Board overruled the challenges by noting that "no limitation was placed upon the tenure of any of the replacements when they were assigned to their duties as decorators."

The court below also avoided the application of the *Mackay* doctrine by suggesting that until the strike was over, there was no determination to replace the strikers. The record establishes the contrary. When

the local management saw that the production crew had remained at work and that there was reasonable hope of continuing the plant in operation, they determined to continue production. To do this, it was necessary to replace the strikers in the needed jobs. This they determined to attempt. They accordingly notified the Unions, while the strike was still in progress, that they would proceed to interview applicants to fill the needed jobs left vacant by the strikers (PA 22).

Thus it is clear that permanent replacement of the strikers was an overall policy, in which the return of some of the strikers was a mere incident. True, the strike was halted—at least temporarily—before any new employee replacements had been obtained, but the replacements actually made might just as well have been new employees as returned strikers. But for the sudden return of the remaining strikers to work, new employees would almost certainly have been obtained, with permanent job tenure. Surely there would be no reasonable ground for requiring disparity in treatment as between such new employees on the one hand and the non-strikers and already returned strikers on the other.

Had the company attempted to discriminate in terms of job tenure, as long as permanent openings were available, between newly hired employees and old employees who repudiated the continuation of the strike, it would clearly have been guilty of an unfair labor practice. *Polish National Alliance* v. *N.L.R.B.*, 136 F. 2d 175 (CA 7). Thus the employees who reported for work before the strike was discontinued were entitled to the status of "new" replacements, i.e., permanent jobholders, unless (as was not the

case here) "some limitation was placed upon their tenure . . . when they were assigned to their duties . . .", *Columbia Pictures Corporation, id., supra.*

The case of *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (CA 9), holds that the *Mackay* doctrine is equally applicable to the same facts as in this case. In the *Potlatch* case, as here, the employer treated old employees who abandoned the strike as permanent replacements, though they had been given no promise of such tenure when they disregarded their union's instructions and returned to work. The employer there adopted exactly the same basis as petitioner for determining retention order of employees in the event of a layoff. It was said by the court:

> "The record here does not disclose that Potlatch in fact assured the replacements that 'their places might be permanent'; however, that assurance need not be proved. The Supreme Court in the Mackay Radio case was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure. In this case Potlatch advocated 'strike seniority' before the strike was settled, adopted that policy at the time of settlement and has consistently maintained that policy at all times thereafter. Potlatch has, since prior to the settlement of the strike, endeavored to make the places of the replacements as nearly permanent as may be. The propriety of this concern was settled in the Mackay Radio case."

It is true in the instant case that at the time the strikers returned to work the Company had not as yet formally designated the positions in the maintenance unit which it intended to continue in its job structure, nor had it designated which positions it

intended to eliminate. This, however, is scarcely a distinguishing feature from *Potlatch* for, as we have seen, there being a surplus of permanent jobs here prior to March 17, the employees who repudiated the strike were clearly entitled to fill such vacancies when they applied for reinstatement.

Commenting upon a similar situation, the Court of Appeals for the Ninth Circuit in *Potlatch* observed:

> "While the Mackay Radio case can be formally distinguished on the ground that the Supreme Court in that case was considering a shortage of jobs at the time the strike was settled, rather than a shortage caused by a later curtailment of activities, the assurance of permanent employment in the latter event is equally justifiable."

It is submitted that the fact that on the day the strikers returned petitioner did not inform them whether or not their assignments were permanent or temporary, does not alter the legal situation in the light of the foregoing judicial holdings. The strikers had returned without notice and as there was presumably a backlog of maintenance work which had accumulated during the strike, management obviously could not have effectuated the contemplated layoff instantly. The record does show, however, that within the next 12 days—when it was known just which strikers had returned — the proposed seniority list to govern the layoff was prepared. Before putting the plan into effect the Company disclosed it to the Unions in a good faith attempt to gain their acquiescence.

Despite these well established legal principles, the Board condemns petitioner's course of action by declaring that the inevitable result of petitioner's

seniority policy was to penalize the strikers who remained out longest, thereby discouraging the exercise of their rights under Section 7 and 8(a)(1) of the Act to engage in future strikes.

Conceding that some incidental discouragement as to future strikes may have been involved, that fact nevertheless does not deprive the employer of his right to replace economic strikers, nor the replacements of their right to permanent tenure. Consider the converse case. For analysis, let it be assumed that the Company yielded to insistence by the Unions and displaced the non-strikers and returned strikers in order to make more jobs available for the remaining strikers; that the employees so laid off were the complainants here. Would they not have a perceptibly stronger case than the present complainants. Could they not effectively contend that they had been discriminated against for the purpose of discouraging their exercise of *their right to refrain from striking* because they were not reinstated to the permanent jobs then available. ("Sec. 7. Employees shall have the right . . . to engage in other concerted activities for the purpose of . . . other mutual aid or protection, and *shall also have the right to refrain from any and all such activities.*")

As a basic interpretation of the Act, we understand the general doctrine of *Mackay* to be that where the primary motivation of an action in labor relations is otherwise legal, the fact that the particular action may incidentally tend to discourage the exercise of rights guaranteed in Section 7 does not thereby render the action illegal. *Mackay* holds that the employer may replace economic strikers during the strike and is not obliged to displace such replacements at the end of

the strike in order to provide jobs for the returning strikers. It is obvious that such action would tend to discourage the exercise of the right to strike. The awareness of employees that by engaging in an economic strike they may lose their jobs to replacements must necessarily make them more loath to engage in a strike than would be the case if they were assured that the employer must keep their jobs available during the strike and reinstate them therein at the end.

Yet if the employer makes the replacements in "an effort to carry on the business", or "to protect and continue his business, by supplying places left vacant by the strikers", then he has the right to give the replacements permanent tenure of the jobs and to decline to reinstate the strikers therein.

The doctrine has been given well established application in other areas besides reinstatement of economic strikers. A "no strike" clause may legally be included in a contract. Here it is apparent that a more direct restraint upon the exercise of the right to strike could not well be imagined. Yet it is well established that by agreement between the employer and the bargaining representatives, this restraint may be legally imposed and will be enforced by the courts. *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332.

Another facet of the *Mackay* doctrine is illustrated by *Kansas Milling Co.* v. *N.L.R.B.*, 185 F. 2d 413, 420, where the court pointed out that management has no duty to warn economic strikers in advance of their return to work that they "might be out of a job", declaring that in an economic strike the company had a right without notice to replace the strikers with other permanent employees.

2. The Board and the Court Below Erred in Finding That the Unions Had Terminated Their Strike Before the Layoff List Was Announced

As noted in our "Statement", the Board's underlying premise in drawing its inference of punitive motivation on petitioner's part was that the strike was "over" and the strikers had been put back to work at the time the new seniority lists were drawn. Hence the Board contended the Company had no "legitimate economic interest" in protecting the employees who had repudiated the strike. The trouble with this reasoning is that the factual premise is inaccurate in two respects:

(1) It ignores the fact that inasmuch as a determination to reduce the maintenance force by 94 jobs had been made *before the strike*, there were simply not a sufficient number of permanent jobs available on March 17 (when the Unions told the remaining strikers to return) to take care of all the strikers. We have pointed out that the employees who remained at work or who had previously abandoned the strike—like new replacements—had a prior claim to these jobs in the absence of any notice limiting their tenure, and hence the strikers who remained out were entitled only to what residue was available when they applied for reinstatement.

(2) At the time the layoff list was drawn (on or about March 29) and the layoffs announced (April 2), the strike was not "over" in the sense that it had been settled. All that had occurred was that the strikers who had not previously abandoned the strike, were sent back to the plant on March 17 by Radford, the Unions' leader. But as the latter made clear in his

letter of March 29, he had directed the striking employees to return "without any agreement whatsoever". Thus the Unions on all the crucial dates (March 29, April 2, and April 9) were free to resume the strike whenever it suited their purpose. In fact, Radford in the same letter referred to "unresolved issues" and made a thinly veiled threat to renew the strike unless concessions were forthcoming, stating "the alternatives which we may pursue are very limited".

The setting of petitioner's actions on March 29 and April 2, consequently, was entirely different from the situation depicted by the Board. The dispute which had caused the strike was still current. The Unions had neither accepted the employer's last pre-strike proposal nor withdrawn any of the demands which the strike was undertaken to enforce. In fact, as late as April 20, the Unions in a letter were still pressing for a wage increase, albeit, a smaller one than their original demand. No settlement agreement had been made nor had the terms of a new contract been agreed upon. Under these circumstances if the Unions had a legal right, as the Board seems to think, to insist that the layoff should have been made on the basis of the old seniority list under the expired contracts, the employees who had remained on strike until the Unions' decreed otherwise could have "bumped" both new and old replacements if they had enjoyed earlier preference on the seniority ladder under the old contracts.

Then if petitioner had not acceded to the Unions' terms, there was nothing to prevent them from resuming the strike, leaving petitioner with only a handful of the workers who had previously repudiated

the strike and gone back to work. Needless to say, if these employees had received such treatment, petitioner's chances of finding a maintenance crew either through new or old replacements, in event of another strike, would have been slender indeed.

Under these circumstances, it is difficult to understand how the Board could have concluded that Plant Manager Wright's expressed intention to give whatever job security he could, was not justified by "legitimate economic interest". Unless he could do this, management's ability to continue operations would have been severely impaired in the event the Unions decided to end their temporary armistice.

Something might be said for the Board's position had the Unions returned the men to work under the terms of a new contract. Then, had management at some later date decided upon a layoff and placed the strikers at the bottom of the retention list, there would be some basis for an inference that petitioner was either being vindictive against the strikers or was punishing them as a deterrent to another strike, should an impasse ensue in the next contract negotiating period. This, however, was not the setting within which petitioner acted.

Unfortunately upon judicial review the Court of Appeals also adopted the Board's erroneous factual assumption that the strike had been permanently ended. As a result the court failed to perceive that the factual situation in this case was on all fours with that in the *Potlatch* case, *supra*. It distinguished this case from *Potlatch* primarily on the ground that there the employer, although having given no assurance of super-seniority to the replacements,

insisted in the discussion concerning strike settlement that such a policy be followed with respect to layoffs, whereas here the new seniority policy was not mentioned "until the strike was over and the strikers had *returned* to work."

But what the court failed to perceive was that in this case, there having been no strike settlement, the strike was not really terminated in any fundamental sense. A mere truce had occurred, and in the first conference (April 2) looking to a strike settlement, petitioner, like the employer in the *Potlatch* case, immediately proposed that the union recognize its strike seniority policy as a part of that settlement.

Thus, when the record in this case is examined it becomes apparent that there is no relevant factual distinction between the two cases.[3]

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[3] The Board also seems to give some weight to the fact that the matter of relative seniority was never mentioned to any of the employees during the strike (PA 37). The Board appears to have overlooked its own rule. Had petitioner expressly offered such an inducement for abandoning the strike to the workers, the Board under its current decisions would have attacked such an offer as an unfair labor practice. The Trial Examiner in his opinion here points this out, citing *Dinion Coil Co., Inc.*, 110 NLRB 196, for the proposition that a threat to withdraw "seniority credits" during an economic strike was an unfair labor practice (PA 62). The Board in its annual reports has stated that it recognizes the right of employers to solicit a return to work by economic strikers only if the solicitation is not accompanied by any promise of benefits. Nineteenth Annual Report of N.L.R.B., p. 78. See *American Rubber Products Co.*, 106 NLRB 73; *Texas Co.*, 93 NLRB 1358, 1362.

3. None of the Employees Had Any Seniority Rights Because the Contracts Had Expired and the Board's Order Imposing Its Own Seniority Policy Upon Petitioner Is Beyond Its Authority

The basic fallacy in the Board's approach to this controversy is illustrated by the way it framed its remedy. Its order is based on the assumption that the employees at the time of the strike and thereafter enjoyed certain seniority rights, when in fact, the contracts conferring such rights upon them had expired on February 10, 1954, several days before the strike began.

As we read the decisions, employees acquire no seniority rights absent a contract providing them. Without such provisions, the employer may operate without employee seniority or may adopt any seniority provisions which are not in violation of the law. In the case here, owing to the previous expiration of the old contracts, no seniority provisions existed until the Company adopted the provision complained of.

The Board directs the Company to rescind "its discriminatory seniority policy" and to "restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy." How is the Company to determine "the seniority they would have enjoyed." The Board does not, and obviously cannot, formulate and impose a seniority policy. The law prescribes none. There is no contract.

In *Aeronautical Industrial District Lodge 727* v. *Campbell,* 337 U.S. 521, 526, a returning veteran seeking replacement in his job pursuant to the provisions of the Selective Service Act, claimed seniority rights with respect to layoff beyond those provided in the applicable collective bargaining agree-

ment. Specifically, the agreement provided super-seniority for union chairmen. The veteran had a greater length of service with the employer than some of the union chairmen. When a layoff occurred, these chairmen were retained and the veteran was laid off. It was said by this Court:

> "In providing that a veteran shall be restored to the position he had before he entered the military service 'without loss of seniority,' § 8 of the Act uses the term 'seniority' without definition. *It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining.* We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran.
>
> "Barring legislation not here involved, *seniority rights derive their scope and significance from union contracts,* confined as they almost exclusively are to unionized industry. See Trailmobile Co. v. Whirls, 331 U.S. 40, 53, note 21, 67 S. Ct. 982, 988, 91 L. Ed. 1328."

In *Elder* v. *New York Central Railroad Company* (CA 6), 152 F. 2d 361, 364, the employee contended that by the employer's refusal to reinstate him as clerk, pursuant to a collective bargaining agreement which deprived him of all seniority rights, "he had been deprived unlawfully of a legally constituted seniority right." The Court's analysis of the source and nature of seniority rights we think is equally applicable to the case here. It was said by the Court:

> "The seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable

> economic security, of which he may not be unlawfully deprived. The right, however, is not inherent. * * * In the absence of statute, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment. In the instant case, the appellant rests upon no right created by statute, but solely upon a collective bargaining agreement, made between the chosen representative of the workers and the employer. * * *
>
> "As was pointed out in System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A.R. Co., 5 Cir., 119 F. 2d 509, 515, *the authorities are uniform to the effect that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life,* when it has been terminated in accordance with its provisions."

The Board notes in its decision (PA 37) that seniority under the old contracts provided "the only layoff system shown by the record to be in effect at respondent's plant prior to the advent of super-seniority." This fact seems irrelevant, in view of the fact that the old contracts had expired and that the seniority rights existing thereunder did not extend "beyond the life" of such contracts.

It seems apparent that only the Company had the right to determine which of the surplus employees were to be displaced on account of the reduction in the number of available jobs. It further seems clear that the Company, in making this determination, is

left to any method of choice not denounced by law. In *Mackay* (304 U.S. at p. 347) (like this, a non-contract case), it was said by this Court:

> "As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill or ability, but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions during the strike, but it is found that the preparation and use of the list, and the action taken by respondent, was with the purpose to discriminate against those most active in the union."

4. Petitioner Did Not Refuse to Bargain in Good Faith

The Board's primary ground for its finding of refusal to bargain was its view that petitioner could not in good faith insist upon the Unions' acceptance of its proposal on the point of recognition of permanent tenure, because petitioner could not legally assign that tenure to the employees in question. In other words, the Board seems to imply that because, in its opinion, petitioner's job retention policy was discriminatory under Section 8(a)(1) and 8(a)(3), it was not entitled to insist upon this proposal to the point of impasse.

If this is the Board's rationale, the validity of its Section 8(a)(5) finding against petitioner would seem to depend upon whether or not petitioner's layoff policies were illegal, *per se*. Consequently, if this Court agrees with us that such policies and the action taken to implement them, did not violate either Section

8(a)(1) or 8(a)(3) of the Act, we submit that the finding that Section 8(a)(5) was violated cannot stand.

Inasmuch as the Board abstained from any specific finding that petitioner's proposal was illegal, *per se*, and advanced some other considerations as supporting its ultimate conclusion that petitioner had failed to bargain in good faith, a few words about this aspect of the case seem appropriate.

The Board found that the Company's insistence upon including its permanent tenure proposal in the new contract demonstrated its

> "bad faith resolve never to come to terms on a written agreement. *Viewed against this background,* the respondent's other responses to the Unions' attempts to continue bargaining conferences gain added significance as revealing an outright decision to refuse to bargain" (PA 39).

The court below said that the Board found

> ". . . upon the basis of the entire course of bargaining *and particularly in view of the company's insistence* upon super-seniority for non-strikers or returning strikers . . ."

that petitioner had refused to bargain collectively in good faith.

The Company was not required to yield upon its "superseniority" proposal unless it was without legal standing in advancing the proposal. Section 8(d) of the Act specifically provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession."

We respectfully submit that in making these observations the Board disregarded the admonition of this Court that it is "clear that the Board may not either directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404.

The notion that an employer cannot insist upon a particular contract proposal merely because the Board views it as unreasonable has been repeatedly disapproved by the courts. In *N.L.R.B.* v. *Corsicanna Cotton Mills* (CA 5), 179 F. 2d 234, 235, the Court stated:

> "The freedom to negotiate is no less a basic right of an employer than of employees. * * * The law does not authorize the National Labor Relations Board or the courts to make collective bargaining contracts or to prescribe what shall be written into them. *Neither the courts nor the Board may interfere in negotiations as long as they are being carried on in good faith.*"

To the same effect, see *N.L.R.B.* v. *Whittier Mills Company* (CA 5), 123 F. 2d 725.

In *N.L.R.B.* v. *I.B.S. Mfg. Co.* (CA 5), 210 F. 2d 634, 33 LRRM 2583, it was held that an employer's demand for a union performance bond was not a refusal to bargain in violation of the Act. In reversing the Trial Examiner's finding that the employer had not refused to bargain, the Board stated:

> "At the July, 1949 conference, the Respondents refused to state that they were not still insisting on such a performance bond as a condition precedent to an agreement. Instead, by asserting

> that the cases holding such insistence to be unlawful were not controlling, the Respondents clearly revealed that a performance bond was still a condition precedent to an agreement. By such insistence, we find that the Respondents violated Section 8(a)(5) and (1) of the Act."

The Court in reversing the Board's ruling on this point stated:

> "We have not compelled, we will not compel, an employer to agree to a particular provision of a contract. It is necessary that the courts make it clear that a finding of good faith in bargaining cannot be based upon whether a particular provision seems reasonable or unreasonable to the board, or whether the board thinks the provision should be agreed to. It must be based entirely upon a consideration of the negotiations as a whole and upon a judgment based not upon the proposal or rejection of a particular proposition but upon clear proof derived from evidence and not from suspicion and conjecture that the Respondent had not intended to bargain and had not bargained in good faith, that is, that the Respondent had no wish for an agreement but rather a wish to the contrary, and had conducted itself so as to defeat rather than promote agreement."

With respect to the Board's finding of a "bad faith resolve never to come to terms on a written agreement" (PA 39), we point out first that the finding was necessarily erroneous because petitioner actually signed a contract with one of the Unions before the Board's decision. It is true that the Board rejected the evidence of this fact, but it seems to be clearly pertinent, particularly in view of the language of the

Board's finding. The authorities cited by the Board for rejecting appear to us to have no bearing.

Aside from this are the facts that the court below found that petitioner has no anti-Union background, that its bargaining history with the Unions showed agreement upon contracts containing the favorable provisions generally sought by unions, and that it bargained frequently with the Unions over a period of several weeks before and during the strike (PA 12) in what the Board does not deny was a bona fide effort to reach an agreement. The bargaining after the strike encountered the impasse upon the permanent tenure provision. Agreement was reached upon all other points of a new contract, *which the Company offered to sign.*

With regard to the Board's finding that the Company "rejected" the Unions' request of March 15, 1954, for a collective bargaining meeting by suggesting that their proposal be made through the Federal Mediation and Conciliation Service (PA 39), the Board must have overlooked Radford's letter of March 23, 1954 (PA 23), saying that petitioner's representatives on March 15, 1954 advised him "to relay my proposal of *resuming negotiations* to Mr. William Rose of the Federal Mediation and Conciliation Service." Surely since Mr. Rose had participated in the negotiations up to that point, it was only natural for petitioner to recognize Mediation's participation in the negotiations by requesting that the date of the conference be fixed through him, so as to be sure of his convenience.

Moreover, it seems clear that petitioner's request after the impasse had developed, "that the Unions' proposal be submitted in writing" (PA 39), was a

reasonable measure to ascertain whether the Unions had changed their position on any material point. We think that it is a commonplace of collective bargaining that when an impasse has been reached, either party is entitled to decline to meet again until the other gives assurance that it is willing to change its position, thus avoiding the "Marathon discussions" which this Court referred to in the *American National Insurance Co.* case, *supra.* The same observation applies to the Board's finding that petitioner on April 27 "refused still another invitation to bargain" (PA 39).

Thereafter, the Unions made no further request for a conference and petitioner took the initiative in seeking a subsequent conference, which was held.

It seems clear that these facts neither singly nor as a whole justify a finding of refusal to bargain.

(h) CONCLUSION

WHEREFORE, in the light of the foregoing considerations, we request this Court to reverse the order of the court below with instructions to set aside the order of the Board and to deny the Board's cross petition for enforcement.

Respectfully submitted,

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Section 8, (c) 18
Section 8 (d) 15
Section 10 (a) 32
Section 10 (c) 32
Section 13 ..... 11, 13, 33

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 153

OLIN MATHIESON CHEMICAL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 25–34)[1] is reported at 232 F. 2d 158. The findings of fact, conclusions of law, and order of the National Labor Relations Board (P. A. 36–76) are reported at 114 N. L. R. B. 486.

JURISDICTION

The judgment of the court below was entered on April 9, 1956 (R. 33). The petition for a writ of

[1] The record consists of the proceedings in the court below and the appendices to the briefs of the petitioner and the Board below which are designated, respectively, "P. A." and "B. A." The proceedings in the court below, which follow numerically the Board's appendix below, are designated "R."

certiorari was filed on June 9, 1956, and was granted on October 8, 1956 (R. 34). 352 U. S. 819. The jurisdiction of this Court rests on 28 U. S. C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are appended *infra*, pp. 31–33.

QUESTIONS PRESENTED

1. After the termination of an economic strike, petitioner adopted and implemented a seniority policy whereby the employees who did not participate in the strike, or who abandoned the strike and returned to work, were, for purposes of layoffs, accorded seniority over the employees who remained out until the strike was concluded. The first question presented is whether this course of action by petitioner discriminated against the latter group of employees within the meaning of the Act and in violation of Section 8 (a) (3) and (1).

2. Whether substantial evidence supports the Board's finding that petitioner, in violation of Section 8 (a) (5) and (1) of the Act, failed to bargain in good faith with the unions representing its employees, particularly in view of its insistence upon incorporating in a collective bargaining agreement the seniority policy referred to in Question No. 1.

STATEMENT

I. THE FACTS

A. PETITIONER'S DISCRIMINATION AGAINST STRIKERS

From February 24 to March 17, 1954, a number of petitioner's 234 maintenance employees engaged in a peaceful strike to support the position of their bargaining representatives[2] in contract negotiations (P. A. 46–47; 4–7, 20). Although petitioner hired no new employees, its plant continued to operate with a work force of employees who remained at work and strikers who returned to work of their own accord during the course of the strike (P. A. 51, n. 5, 61, 63; 16, B. A. 22). When the Unions called off the strike on March 17, petitioner reinstated the remaining strikers (P. A. 48; 7–8).

Prior to the strike, petitioner had decided, for economic reasons, to lay off 94 maintenance employees. As of the end of the strike, however, it had not yet selected the particular employees to be laid off (P. A. 37; 19, B. A. 10). A few days before March 29, petitioner's plant manager recommended to his superiors that those employees who had remained at work, or who had returned during the strike, should,

[2] The maintenance employees were represented by three unions: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, AFL; United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL; and International Brotherhood of Electrical Workers, Local 425, AFL (herein collectively called the Unions).

if possible, be retained in the work force because petitioner "owed these men an obligation for as much job security as possible" (P. A. 37, 61; 16). Thereafter, at an April 2 bargaining session with the Unions, petitioner for the first time proposed that the following clause be incorporated in the seniority provisions of the contract under negotiation (P. A. 37, 50; 8–9, 25):

> Anything in this Article IV on seniority to the contrary notwithstanding, employees in the journeymen classification and employees in the Helper Classification within a Work Group covered by this Contract who were not at work from February 25, 1954, until at or after noon on March 17, 1954 [the initial and terminal dates of the strike], shall be laid off before any employee so classified in the same Work Group who remained at or returned to work or was hired during the period from February 25, 1954, to noon March 17, 1954, is laid off.

At the same time, petitioner further announced an imminent layoff of 94 maintenance men to be selected on the basis of the foregoing seniority proposal. (P. A. 37, 50; 8–9). When the Unions objected strongly to such a policy and said they could "never agree to it" (P. A. 50, 9, B. A. 8), petitioner's spokesman replied that he "felt that the ones that come across the picket line, and so forth, deserved * * * a little something for helping support the breaking [of] the strike" (P. A. 37, 63; B. A. 8). In explaining, at a subsequent bargaining conference with the Unions in March 1955, petitioner's insistence upon superseniority for these employees, petitioner's attorney stated (P. A. 37, 61, 63; B. A. 22): "I think the thing that

counts is loyalty to the job and keeping this facility running. Many realize this plant has shut down before and they don't want to see that happen again."

Pursuant to this superseniority policy, the maintenance employees laid off on April 9, 1954, included seven full-term strikers (the complainants in this case) who were senior in point of service to a corresponding number of retained employees who had returned to work before the end of the strike (P. A. 37; 2–3). The complainants would not have been laid off if petitioner had followed the system for layoffs prevailing prior to April 2, 1954, under expired contracts with the Unions (P. A. 37; 2–3).

B. PETITIONER'S REFUSAL TO BARGAIN IN GOOD FAITH

When the strike interrupted contract negotiations on February 24, 1954, petitioner and the Unions had reached agreement on many issues, but other matters, primarily wage rates, remained unsettled (P. A. 47; 5, 19–21, 26). Thereafter, on March 15, 23, and 29, the Unions requested a resumption of negotiations (P. A. 48–50; 23–24, B. A. 3, G. C. Exh. 13, R. 52–54). After first replying that the Unions should make their proposals through the Federal Mediation and Conciliation Service, petitioner finally agreed to meet on April 2 (P. A. 48, 50; 23–25, B. A. 3, R. 52–55). At this meeting, petitioner offered to sign contracts containing all provisions agreed upon prior to the strike if the Unions would agree to the superseniority clause set forth *supra*, p. 4 (P. A. 50; 8–9, 25, B. A. 10). Despite the Unions' vigorous objections to the superseniority proposal, petitioner, a few days later, effected

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a layoff in accordance with this policy (P. A. 50–51; 2–3, 9). Shortly thereafter, petitioner refused to meet with the Unions, stating that if the Unions had any proposals to make they should submit them in writing (P. A. 51; 26–27, B. A. 15). When the Unions subsequently submitted written proposals, petitioner rejected them, stating that it would not recede from its superseniority policy or from its refusal to grant any wage increase, and it refused to meet further with the Unions on the ground that this would be "futile" (P. A. 51–52; 10, 26–27, B. A. 15). The parties again met about ten months later, on March 3, 1955, after the Unions had filed charges initiating the instant unfair labor practice proceedings. Although the parties were in agreement on all other issues, petitioner still insisted upon incorporating its superseniority policy in any contract (P. A. 53, 54; 11, 28–29, 30–33, 35–36, B. A. 4–6, 8, 9, 16–17, 17–21, R. 145–146). Rejecting the Unions' suggestions that decision on this issue should be held in abeyance until the Board had passed on the question or that the proposed agreement be amended to include this provision only if the Board upheld its legality, petitioner persisted in its demand for immediate inclusion of the superseniority clause (P. A. 55–58; 11–12, 30–31, B. A. 17–21, G. C. Exh. 25, 26).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts and the entire record, the Board found (P. A. 37, 38) that petitioner, by adopting and implementing the superseniority policy after the strike, was "motivated, not by any legitimate eco-

nomic interest of its own, but by a desire to punish the complainants for exercising the right guaranteed in Section 7 to engage in concerted activities, and a wish to reward the other employees for abandoning or not participating in the strike." Accordingly, the Board concluded that petitioner's policy discouraged membership in the Unions which the employees had selected as their bargaining representatives, in violation of Section 8 (a) (3) of the Act, or infringed upon the employees' general statutory right to engage in concerted activities for mutual aid or protection, in violation of Section 8 (a) (1). In concluding that petitioner's seniority policy was prompted by a purpose to penalize its employees for having exercised their statutory rights, the Board considered it highly significant (P. A. 37) that it was not until the strike was over, and all the strikers had been put back to work, that petitioner for the first time decided on the plan to separate its employees into the two seniority groups for layoff purposes. The Board also noted (*ibid.*) that there was no claim by petitioner, and no suggestion in the record, that petitioner had promised employees superseniority in order to get them to work during the strike or, indeed, that it had ever mentioned the matter of relative seniority to any employee until after the strike was over and all the strikers had been reinstated.

The Board also concluded (P. A. 38–40) that petitioner had violated Section 8 (a) (5) and (1) of the Act by refusing to bargain in good faith with the Unions. The Board's finding of bad faith was predicated upon the retaliatory nature of the seniority

clause; petitioner's insistence that the Unions accede to that clause or forego any contract at all; and petitioner's conduct during March and April 1954 (when it rejected the Unions' request for a bargaining conference by stating that their proposals should be made through the Federal Mediation and Conciliation Service; turned down another request for a meeting with the advice that the Unions' proposals should be submitted in writing; and then refused to meet on the ground that further negotiations would be futile).

The Board ordered petitioner to cease and desist from the unfair labor practices found and from infringing in any manner upon its employees' exercise of their statutory rights. Affirmatively, the Board ordered petitioner to reinstate the seven unlawfully laid-off employees and to make them whole for any loss of pay suffered by reason of the discrimination against them; to rescind its discriminatory seniority policy and restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy; to bargain with the Unions upon request; and to post appropriate notices (P. A. 40–42, 74–76).

III. THE DECISION BELOW

The court below (Chief Judge Parker and Judge Dobie, with Judge Soper dissenting) accepted all of the Board's findings of fact and conclusions of law and enforced the Board's order (R. 25–34).

Rejecting petitioner's contention that its superseniority policy was a permissible measure comparable to the replacement of economic strikers sanctioned by *National Labor Relations Board* v. *Mackay Radio &*

Telegraph Co., 304 U. S. 333, the court distinguished that case on the ground that, while an employer may be entitled to promise replacements permanent employment in order to keep his plant in operation during a strike, petitioner discriminated in favor of "loyal employees" *after* the strike, i. e., not to keep operating, but in order to penalize the strikers and discourage future strikes. In this respect, the court observed (R. 28–29):

> The strike was over, the strikers had returned to work. The Olin plant was in full operation. * * * Olin, after the strike, when there was no necessity for such action to keep its plant in operation, promulgated its superseniority policy in favor of the so-called "loyal employees" and against those who returned to work after the strike had failed and was over. Olin was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future. This, we think, Olin cannot lawfully do. Olin's attorney, Stull, admitted in one of the conferences with Union representatives that Olin's insistence on the superseniority plan was motivated by Olin's preference for employees who had been loyal to Olin by helping to break the strike, and also Olin's concern that the plant be not "shut down again."

Distinguishing *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (C. A. 9), Judge Parker's opinion points out that in *Potlatch* the employer advocated its seniority policy before the strike was settled; that there was no evidence that his motive

was to penalize the strikers; and that the "replacements" included some new employees. The court below also indicated that it disagreed, in any event, with the Ninth Circuit's failure to distinguish between promises of permanent tenure made during a strike in order to procure replacements and the post-strike imposition of a superseniority policy favoring "loyal employees" and prejudicing reinstated strikers.

Finally, upon the basis of the "entire course of the bargaining", as well as petitioner's insistence upon superseniority, the lower court found adequate record support for the Board's finding that petitioner had refused to bargain in good faith with the Unions.

SUMMARY OF ARGUMENT

1. The Board and the court below properly found that petitioner's seniority policy favoring "loyal" employees was discriminatory within the meaning of the Act and violative of Section 8 (a) (3) and (1). The record discloses that, after the strike was over and all the strikers had returned to work, petitioner for the first time decided to separate its employees into two groups for lay-off purposes: one group consisting of those who remained at work during the strike or abandoned the strike; the other comprising those who remained out until the strike failed. This was done for the avowed purpose of rewarding the "loyal" employees and discouraging future strikes. Petitioner implemented this policy when it laid off seven full-term strikers who were senior in point of service to a corresponding number of retained employees who had returned to work before the end of the strike.

Sections 7 and 13 of the Act assure to employees the right to engage in concerted activities for mutual aid or protection. This includes the right to engage in peaceful strikes over terms and conditions of employment. To carry out this basic policy, Congress, in Section 8 (a) (1), forbade abridgement by an employer of the rights accorded by Section 7; and, in Section 8 (a) (3), it forbade discrimination in employment on the basis of union activity or other concerted activity for mutual aid or protection.

The seniority policy which petitioner adopted and implemented—a policy based solely on the employees' participation or non-participation in concerted activity which the Act normally protects—plainly discriminated against the full-term strikers, and a necessary consequence of such disparate treatment was to discourage resort to strike action in the future. The penalty thus visited upon the full-term strikers constitutes a patent infringement of the statutory right to engage in peaceful strikes.

The decision of this Court in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–346, does not support petitioner's attempted justification of its seniority policy. In that case, this Court held that, during a strike, an employer may replace economic strikers in an effort to maintain business operations, and that he need not discharge the replacements to make room for returning strikers. Apart from other considerations, the decisive difference between *Mackay* and the instant case is that here petitioner, as it concedes, adopted and implemented the discriminatory seniority policy

after all the employees had resumed work. Once the strikers had returned to work, any allocation of permanent jobs on the basis of the employees' participation in the strike could no longer be justified on the ground that it was necessary to keep petitioner's business operating during the strike. Petitioner's asserted desire to protect its business against possible future strikes does not excuse an infringement upon the rights guaranteed employees by the Act. Moreover, nothing in the record suggests that the return to work was merely a tactical maneuver or that any resumption of the strike was contemplated.

Nor does it aid petitioner that all of the employees were union members and that, so far as appears, none of them withdrew from membership. The Act proscribes "discrimination to discourage participation in union activities as well as to discourage adhesion to union membership," and it is not necessary to show by "immediate manifestations," the impact upon the employees' exercise of their statutory rights (*Gaynor News Company* v. *National Labor Relations Board,* 347 U. S. 17, 39–40, 51). Equally unavailing to excuse petitioner's conduct is the absence of a contract governing seniority. While the Act does not confer any specific seniority rights upon employees, it clearly prohibits any form of discrimination grounded on participation in protected activities.

2. The Board and the court below properly found that petitioner refused to bargain in good faith by its insistence upon a discriminatory seniority clause and by its dilatory tactics in responding to the Unions' requests for bargaining conferences.

ARGUMENT

I. THE BOARD AND THE COURT BELOW PROPERLY FOUND THAT PETITIONER'S SENIORITY POLICY, FAVORING EMPLOYEES WHO ABANDONED THE STRIKE OR DID NOT PARTICIPATE IN IT, WAS DISCRIMINATORY WITHIN THE MEANING OF THE ACT AND IN VIOLATION OF SECTION 8 (a) (3) AND (1)

The statutory protection vouchsafed by the Act to employees who engage in peaceful strikes over terms and conditions of employment is not open to question. "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *International Union, U. A. W.* v. *O'Brien*, 339 U. S. 454, 457; *Amalgamated Association* v. *W. E. R. B.*, 340 U. S. 383, 389, 404; *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 672, n. 6. By Section 2 (3) of the Act it preserved to such strikers their status as employees, and by Section 7 it declared that employees "shall have the right" to engage in "concerted activities" for "mutual aid or protection." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344–345. To implement this right, Congress, in Section 8 (a) (1), forbade abridgement by an employer of the rights guaranteed by Section 7; and in Section 8 (a) (3) it forbade discrimination in employment to "discourage participation in union activities as well as to discourage adhesion to union membership." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 29–42. Special legislative solicitude for the right to strike was again expressed in Section 13, which states that "Nothing

in this Act, except as specifically provided for herein, shall be construed so as * * * to interfere with or impede or diminish in any way the right to strike * * *." *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 673; *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U. S. 270, 284.

It can scarcely be denied that petitioner's seniority policy discriminated against the full-term strikers, and that a necessary consequence of such disparate treatment, based solely on participation in concerted activity which the Act normally protects, would be to discourage resort to strike action in the future. *Gaynor News Co., Inc.* v. *National Labor Relations Board*, 347 U. S. 17, 46. As set forth above, pp. 3–4, after the strike was over and all the strikers had returned to work, petitioner for the first time decided to separate its employees into two groups for lay-off purposes: one group consisting of those who remained at work during the strike or abandoned the strike; the other comprising those who remained out until the strike failed. Petitioner implemented this policy when it laid off the seven full-term strikers who were senior in point of service to a corresponding number of retained employees who had returned to work before the end of the strike. The penalty thus visited upon the full-term strikers constitutes a patent infringement of their statutory right to engage in strike action for purposes of mutual aid or protection, in violation of the statutory bans forbidding discrimination against employees for engaging in concerted

activity and interference with their exercise of the rights guaranteed by Section 7 of the Act.

To be sure not every action of an employer which may be said, in a literal sense, to inhibit the exercise of the right to strike necessarily constitutes a violation of the Act. Although the statutory protection accorded to the right to strike (unless exercise of that right is otherwise expressly prohibited) is couched in absolute terms, the right, like others guaranteed by the Act, must necessarily be balanced against other competing legitimate interests of society in general or of the employer in particular. And the Board, consistent with the statutory policies and objectives, may appropriately accommodate such competing interests. See *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112; *Republic Aviation Corp* v. *National Labor Relations Board*, 324 U. S. 793, 797. Thus, the interest of society in the lawful, peaceful conduct of a strike may, on balance, result in the loss of statutory protection for the striker who acts in an unlawful manner or for an unlawful purpose.[3]

[3] See, e. g., *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 252–259; *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 343–344; *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 750–751. Moreover, the Act itself contains four express limitations on the right to strike: Sections 8 (b) (4), 8 (d), 206–210, 305. See *International Union, U. A. W.* v. *O'Brien*, 339 U. S. 454, 457. No such considerations are involved here, as the conduct of the strike was exemplary in all respects, its purpose lawful, and the Unions complied with all notice requirements of Section 8 (d) before the strike action was taken (P. A. 46–47, n. 3; 19–31).

Similarly, it was early recognized by this Court that the employer's legitimate interest in the continuing operation of his plant was a right to be balanced against the broad statutory protection granted economic strikers. Accordingly, in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–346, the Court held that, notwithstanding the statutory provisions guaranteeing employee status to strikers whose work had ceased as the result of a current labor dispute,[4] an employer, who had committed no unfair labor practice, might "replace the striking employes with others in an effort to carry on the business" during the strike, even though such measures might incidentally tend to inhibit the striking employees. The Court stated (*ibid.*):

> * * * an employer, guilty of no act denounced by the statute, has [not] lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. [Footnote omitted.]

The theory of that case, in short, was that an employer is not required to underwrite an economic strike by shutting down while it is in progress and reinstating

[4] Section 2 (3) of the Act, unchanged by the 1947 amendments.

the strikers after it is over. The employer is entitled to keep his plant running if he can find men to do the work of the strikers. If he could hire men only for the duration of the strike, subject to displacement on the return of the strikers, he obviously would have little or no chance of hiring anyone. The balance between the employee's risk of losing his job by striking and the employer's risk of losing his business through an inevitable shutdown was struck in favor of the employer.

Petitioner seeks to bring itself within the *Mackay* rule. The facts establish, however, that petitioner granted preferential tenure to employees who abandoned or did not participate in the strike, and discriminated against those who remained on strike until the end, *not* for the purpose of maintaining operations during the strike, but in order to reward the "loyal employees," to penalize the full-term strikers for having exercised their statutory right to strike, and to discourage the exercise of that right in the future. It was not until the strike was over and all the strikers had been reinstated—when, as the court below pointed out, "there was no necessity for such action to keep its plant in operation" (R. 29)—that petitioner for the first time announced and implemented its seniority policy giving preference to "loyal" employees. There is no claim by petitioner, and no suggestion in the record, that petitioner ever made any promise of preferred tenure in order to obtain a work force while the plant was struck (P. A. 37). Moreover, petitioner's representatives acknowledged that the new layoff policy was motivated by a pref-

erence for employees who had helped to break the strike and by a concern that the plant be not "shut down * * * again" (P. A. 37, 61, 63; B. A. 8, 22). Thus, unlike the action of the employer in *Mackay,* petitioner's seniority policy giving preference to "loyal employees" was not bottomed upon any legitimate considerations of carrying on its business during the strike which might, on balance, justify some incidental infringement of the right to strike. In the absence of such countervailing considerations, the unrestricted prohibitions of the Act, directed against disparate treatment of employees on the basis of their participation in concerted activity and against interference with the exercise of the employees' statutory rights, come into play. This is particularly so where the employer, as here, is prompted by an avowed purpose to reward the "loyal employees" and, conversely, to penalize the full-term strikers and thus discourage future strikes.[5] Such discrimination and interfer-

[5] Whether petitioner's conduct be viewed as a reward to the "loyal employees" or a reprisal against the full term strikers, "the nature of the policy was such," as the trial examiner pointed out (P. A. 61–62), "that the reward could not be paid one except by simultaneously punishing another." Since the purpose and effect of petitioner's action, in either event, was to induce employees to refrain from striking in the future, it constituted an interference with the exercise of a statutorily protected right. "[I]nterference is no less interference because it is accomplished through allurements rather than coercion * * *" (*Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240, 244 (C. A. 7), certiorari denied, 320 U. S. 746). *National Labor Relations Board* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 905 (C. A. 9); *National Labor Relations Board* v. *Bailey Co.*, 180 F. 2d 278, 279–280 (C. A. 6); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. 2d 263, 266 (C. A. 8), certiorari denied, 321 U. S. 769. See also, Section 8 (c) of the Act.

ence are plainly interdicted by the Act. The alteration of employment status is normally discriminatory where it is in "punishment for, or discouragement of, such activities as the act declares permissible." *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132.[6]

[6] Petitioner relies on *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, 86, where the Court of Appeals for the Ninth Circuit held that similar conduct by an employer did not evidence a purpose to penalize full-term strikers or discourage future strikes. The strike seniority policy in *Potlatch* is identical to petitioner's in substance and only technically distinguishable as to timing, since the policy there was first proposed in the course of strike settlement negotiations two days before the end of a two-month strike, but after the strike had failed and the plant had been back in operation for some time (189 F. 2d at 83–84). Although the employer in that case had already procured enough employees to carry on his business without any mention of preferential seniority and the remaining strikers were then attempting to return to work, the Ninth Circuit nevertheless concluded that the employer's seniority policy was consistent with a nondiscriminatory object of continuing operations during the strike. In holding that a punitive purpose was not established, the court stated that the "only evidence to support such a finding is the conclusion that Potlatch must have realized the inevitable consequences of the policy" (189 F. 2d at 86).

We think that the Ninth Circuit erred in reaching this conclusion. In our view, the timing of the seniority policy precluded a finding that the employer was prompted by a purpose to induce employees to work during the strike. And since the nature of the discrimination was inherently such as to discourage strike activity, specific proof of an intent to discourage future strikes was, as this Court has since held, unnecessary. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 44–46. In any event, the instant case, on the findings made by the Board and affirmed by the court below, may be distinguished from *Potlatch*. Here, the decision below as to petitioner's punitive purpose is based not only upon the timing of the seniority policy, but also on independent evidence of petitioner's desire to reward the "loyal employees," and, by necessary implication, to punish the full-term strikers and thereby discourage future strikes.

Petitioner asserts, however (Br. 20, 27), that, since it had decided prior to the strike to eliminate some of the jobs for economic reasons, it could treat those employees who remained at work or abandoned the strike as having replaced the strikers in the permanent jobs. Thus, it argues that "the strikers who remained out were entitled only to what residue was available when they applied for reinstatement." But this contention overlooks petitioner's concession (Br. 23–24) that "at the time the strikers returned to work the Company had not as yet formally designated the positions in the maintenance unit which it intended to continue in its job structure, nor had it designated which positions it intended to eliminate." Thus, not only were no new employees hired during the strike (compare *Mackay*); it is not even suggested that any employee who worked during the strike ever displaced any full-term striker in his job. So far as appears—and petitioner's concession confirms this—at the conclusion of the strike, all of the employees occupied their pre-strike jobs. It was after all of the men were back on the payroll and before "the composition of the layoff had * * * been decided" (Pet. Br. 8) that petitioner divided its employees into two groups for lay-off purposes.[7] Thus, it is apparent that at no time during the strike, when the employer's legitimate in-

[7] Corroborative of the fact that there was no change in the strikers' job status until after the strike was over are petitioner's further statements in connection with the refusal-to-bargain issue. Thus, petitioner concedes (Br. 15) that it first mentioned the matter of strike seniority to the Unions at the April 2 bargaining session, and further asserts (Br. 5, 10, 24, 38) that it bargained with the Unions to an impasse "before putting the plan into effect" (Br. 24).

terest in continuing operations might, on balance, have justified such action,[8] did petitioner attempt, in the *Mackay* sense, to replace the full-term strikers in the permanent jobs. Once the strike was over, any differentiation between the strikers and "loyal employees" solely on the basis of their participation in the strike was without color of justification.

The nature of the permanent tenure which petitioner conferred upon the favored group of employees likewise differs significantly from the kind of permanent tenure involved in *Mackay*. In that case, this Court observed that an employer, in order to carry on his business during a strike, could lawfully give

[8] Petitioner suggests (Br. 30) that under Board decisions it would have committed an unfair labor practice had it sought to recruit a working force during the strike by offering those who remained at work or abandoned the strike greater seniority than the full-term strikers. The Board and some of the courts of appeals have held, generally, that an employer violates Section 8 (a) (1) of the Act when he resorts to threats or promises of benefit to coerce strikers to return to work, and, also, that he violates Section 8 (a) (5) when such solicitation has been conducted under circumstances, and in a manner, reasonably calculated to undermine the strikers' bargaining representative. See, e. g., *The Texas Company*, 93 NLRB 1358, 1360–1362; *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 54 (C. A. 7); *National Labor Relations Board* v. *James Thompson & Co., Inc.*, 208 F. 2d 743, 748–749 (C. A. 2); *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 152–154 (C. A. 7); *Dinion Coil Co.*, 110 NLRB 196, 197, 202–203. However, it is an unresolved issue whether an employer who has determined, before a strike occurs, to make some layoffs may seek, during the strike, to retain a working force by promising the permanent jobs to those who remain at or return to work. In any event, the instant case does not call for a resolution of this issue; for, as stated above, the strike was over when petitioner announced its seniority policy.

"assurance * * * to those who accepted employment during the strike that * * * their places might be permanent" (304 U. S. at 346). This meant that the employer was "not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment * * *" (304 U. S. at 345). But to say that a replacement need not be dislodged at the election of the man replaced does not remotely suggest that replacements would acquire rights superior to strikers who are reinstated. In the instant case, however, petitioner would place all "replacements" in a favored class superior to unreplaced reinstated strikers—a result plainly at odds with Section 2 (3) of the Act which provides that employee status is not interrupted by participation in a strike.

Nor does it follow that because, under *Mackay,* petitioner might have been free to replace the strikers altogether during the strike, it was free, after the strike, to visit the lesser sanction of replacing them on the seniority ladder. Such a contention reduces itself to the claim that economic strikers, who are reinstated, no longer enjoy the full protection of the Act. This argument wholly misconceives the *Mackay* ruling. In that case, the employer's right to hire replacements did not grow out of any right to visit sanctions upon the strikers, but solely out of his right to carry on his business during the strike.[9] An em-

[9] This is demonstrated, for example, by the cases which hold that once economic strikers have applied for reinstatement the employer is not free to replace them. *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 285 (C. A. 4), certiorari denied, 332 U. S. 758; *Firth Carpet Co.* v. *National*

ployer is not free to administer punishment to employees who have lawfully exercised a right protected by the Act, and hence to speak of a "lesser" sanction is wide of the mark. The employer is free to continue operations during the strike and, to that end, to replace economic strikers, but, as we have seen, the so-called seniority adjustment adopted by petitioner after the strike was not bottomed upon that consideration. On the contrary, its purpose and effect were discriminatory and punitive.

Petitioner further asserts (Br. 27–30) that, when it announced its seniority policy, there had been no strike settlement and there was nothing to prevent the Unions from resuming the strike. In these circumstances, petitioner contends, it was entitled to accord the employees who had remained at work or abandoned the strike preferential treatment, so that, in the event of another strike, it could be assured of a loyal working force to maintain operations.

The answer to this contention is twofold. In the first place, nothing in the record suggests that the return of the full-term strikers was merely a tactical maneuver and that the Unions contemplated resuming the strike. As a matter of fact, the strike was not resumed. Nor is it of any consequence that no agreement had been reached between petitioner and the Unions settling their outstanding differences. A strike may be lost and come to an end without any

Labor Relations Board, 129 F. 2d 633, 636 (C. A. 2); *National Labor Relations Board* v. *Shenandoah-Dives Mining Co.*, 145 F. 2d 542, 547–548 (C. A. 10); *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 442 (C. A. 3), certiorari denied, 342 U. S. 868.

settlement. And it has not hitherto been suggested that a strike continues to be in effect, even though the employees abandon it and return to work, merely because they may be called out on strike again if the parties are unable to reach an accord.

Secondly, and more broadly, we submit that an employer's desire to protect his business against possible future strikes cannot serve as justification for infringing the rights which the Act guarantees to employees. Employers are frequently opposed to concerted activity by their employees because of a desire to promote or protect their own economic interests. If such self-interest, standing alone, could justify the adoption of measures prejudicial to employees who had engaged in concerted activities, there would be little left to the guarantees of the Act.[10] Accordingly, an employer has been held to violate the Act when he attempts to avert an impending or anticipated future strike by threatening the would-be strikers with reprisals.[11] Similarly, discrimination or other unfair labor practices against employees are not excused by an employer's fear that economic pressure will be exerted upon him by one of the unions engaged in a

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[10] Cf. e. g. *Duluth Bottling Assn.*, 48 NLRB 1335, 1336, 1359–1360; *Betts Cadillac Olds, Inc.*, 96 NLRB 268; *International Shoe Co.*, 93 NLRB 907, where other special circumstances were present.

[11] *Collins Baking Company* v. *National Labor Relations Board*, 193 F. 2d 483, 485–487 (C. A. 5); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 901–902 (C. A. 3); *Berkshire Knitting Mills* v. *National Labor Relations Board*, 139 F. 2d 134, 140 (C. A. 3); *National Labor Relations Board* v. *Trojan Powder Co.*, 135 F. 2d 337, 339 (C. A. 3).

jurisdictional dispute,[12] by other of his employees,[13] or by his customers.[14] Just as the employer's current "self-interest," in *Gaynor News*, 347 U. S. at 37, 46, could not immunize from the sanctions of the Act the disparate treatment of union and non-union employees in that case, *a fortiori*, an employer's desire to protect his business against future strikes may not legitimize discriminatory measures against employees who have engaged in strike action. To permit an employer, as here, to visit reprisals upon strikers and to accord preferential treatment to those who remain at work, in order to discourage future resort to strike action and to insure a loyal working crew in the event of a strike, would go far to nullify the right to strike. Indeed, carried to its logical conclusion, petitioner's rationale would permit an employer to discharge employees who struck in the past simply on the theory that they might do so again in the future—a result manifestly at odds with settled law.[15]

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[12] *National Labor Relations Board* v. *National Broadcasting Co.*, 150 F. 2d 895, 900 (C. A. 2); *National Labor Relations Board* v. *Gluck Brewing Co.*, 144 F. 2d 847, 852, 853 (C. A. 8); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 752 (C. A. 7); *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C. A. 9); *National Labor Relations Board* v. *Polson Logging Co.*, 136 F. 2d 314 (C. A. 9).

[13] *National Labor Relations Board* v. *McCatron*, 216 F. 2d 212 (C. A. 9), certiorari denied, 348 U. S. 943; *Wilson & Co., Inc.* v. *National Labor Relations Board*, 123 F. 2d 411, 417–418 (C. A. 8).

[14] *Idaho Potato Growers* v. *National Labor Relations Board*, 144 F. 2d 295, 302–303 (C. A. 9); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 752 (C. A. 7).

[15] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344–345, 347–348; *National Labor Rela-*

Petitioner also notes (Br. 12) that all of the employees were union members and that, "as far as the record shows, none of them withdrew from membership." If petitioner means to suggest that these circumstances absolve it of liability under the Act, it is clearly in error. The Act does not require that the impact upon the employees' exercise of their statutory rights have "immediate manifestations." *Gaynor News, supra,* 347 U. S. at 51. "If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the Act demands that the employer be deemed a violator." *National Labor Relations Board* v. *Gaynor News Company,* 197 F. 2d 719, 722–723 (C. A. 2), affirmed, 347 U. S. 17, 38, 51, 55. Restraint upon the future exercise of a statutory right is "a natural consequence of discrimination," and petitioner is accountable for "increasing the number of workers" who would want to refrain from striking "and/or their quantum of desire" to engage in such activity. *Gaynor News, supra,* 347 U. S., at 38, 46. Nor is it of consequence that the favored and penalized employees were all union members. The proscription of Section 8 (a) (3) includes

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tions Board v. *Remington Rand, Inc.*, 130 F. 2d 919, 928 (C. A. 2); *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 635 (C. A. 2); *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 663 (C. A. 2); *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C. A. 3); *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 285 (C. A. 4), certiorari denied, 332 U. S. 758; *National Labor Relations Board* v. *Good Coal Co.*, 110 F. 2d 501, 502–503 (C. A. 6), certiorari denied, 310 U. S. 630; *Carter Carburetor Co.* v. *National Labor Relations Board*, 140 F. 2d 714, 717–718 (C. A. 8).

"discrimination to discourage participation in union activities as well as to discourage adhesion to union membership." *Radio Officers, supra,* 347 U. S. at 39–40. A strike, as here, to support a union's bargaining position is manifestly union activity. Economic sanctions against employees for giving such support to their union necessarily tends to discourage adherence to the union within the meaning of Section 8 (a) (3). In the instant case, the bite of the economic sanctions adopted by petitioner has already been brought home forcefully to petitioner's employees by the dismissal of seven men who otherwise would not have lost their jobs.

Petitioner further argues (Br. 31–34) that because seniority rights derive from union contracts, and not from the Act, it was accordingly free, in the absence of a contract, to establish its own seniority policy or to ignore seniority altogether. However, the unfair labor practice here does not stem from the fact that petitioner deprived employees of seniority or failed to follow the provisions of the expired contracts; it is founded upon petitioner's use of a discriminatory and impermissible criterion as the basis of its new seniority policy, i. e., participation in a strike. The Act prohibits discrimination by employers on the basis of union membership (or lack of it) or on the basis of participation in protected concerted activities. And the protection of Section 8 (a) (3) extends to "all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees'

right of self-organization as if these elements were precise terms of a written contract of employment." *National Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, 218.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT PETITIONER VIOLATED SECTION 8 (a) (5) AND (1) OF THE ACT BY REFUSING TO BARGAIN IN GOOD FAITH WITH THE UNIONS REPRESENTING ITS EMPLOYEES

Petitioner implicitly concedes (Br. 34–35) that acceptance of the Board's view with respect to the illegality of the seniority policy necessarily entails acceptance of the Board's further finding that petitioner violated its statutory bargaining obligation by insisting that any contract contain the objectionable seniority clause. See *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 403 (C. A. 2), certiorari denied, 347 U. S. 953; *National Labor Relations Board* v. *National Shoes, Inc.*, 208 F. 2d 688, 691–692 (C. A. 2); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134–135 (C. A. 1), certiorari denied, 346 U. S. 887; *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811 (C. A. 5), certiorari denied, 342 U. S. 824; *National Labor Relations Board* v. *Tower Hosiery Mills*, 180 F. 2d 701, 703–705 (C. A. 4), certiorari denied, 340 U. S. 811; *National Labor Relations Board* v. *Corsicana Cotton Mills*, 178 F. 2d 344, 346–347 (C. A. 5).

Moreover, the Board's finding of a refusal to bargain rests not only on petitioner's unlawful insistence on a discriminatory seniority clause, but also on petitioner's dilatory tactics in responding to the Union's requests for bargaining conferences. Thus, after the

strike began, petitioner met with the Unions only twice in a period of one year, parrying requests for other conferences with statements that proposals should be submitted in writing or through the Federal Mediation and Conciliation Service, or that a meeting would be futile (*supra*, pp. 5–6). Petitioner's stalling tactics would appear sufficient, without more, to support a finding of bad-faith bargaining. *National Labor Relations Board* v. *United States Cold Storage Corp.*, 203 F. 2d 924, 928, 929 (C. A. 5); *National Labor Relations Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 683 (C. A. 2); *National Labor Relations Board* v. *Gittlin Bag Company*, 196 F. 2d 158, 159 (C. A. 4); *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 132–134 (C. A. 9), certiorari denied, 338 U. S. 827; *National Labor Relations Board* v. *National Shoes, Inc.*, 208 F. 2d 688, 692 (C. A. 2). However, since the finding of bad faith here is enmeshed with the finding that discriminatory motivation lies at the root of petitioner's seniority clause, we think it would be appropriate, should this Court disagree with the Board's position on the seniority issue, that the Court remand to the Board to permit it to pass upon the question whether petitioner has otherwise refused to bargain in good faith.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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JANUARY 1957.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association, or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mu-

tual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * * * *

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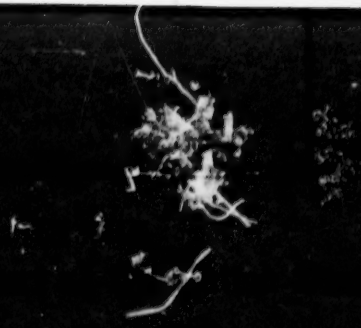

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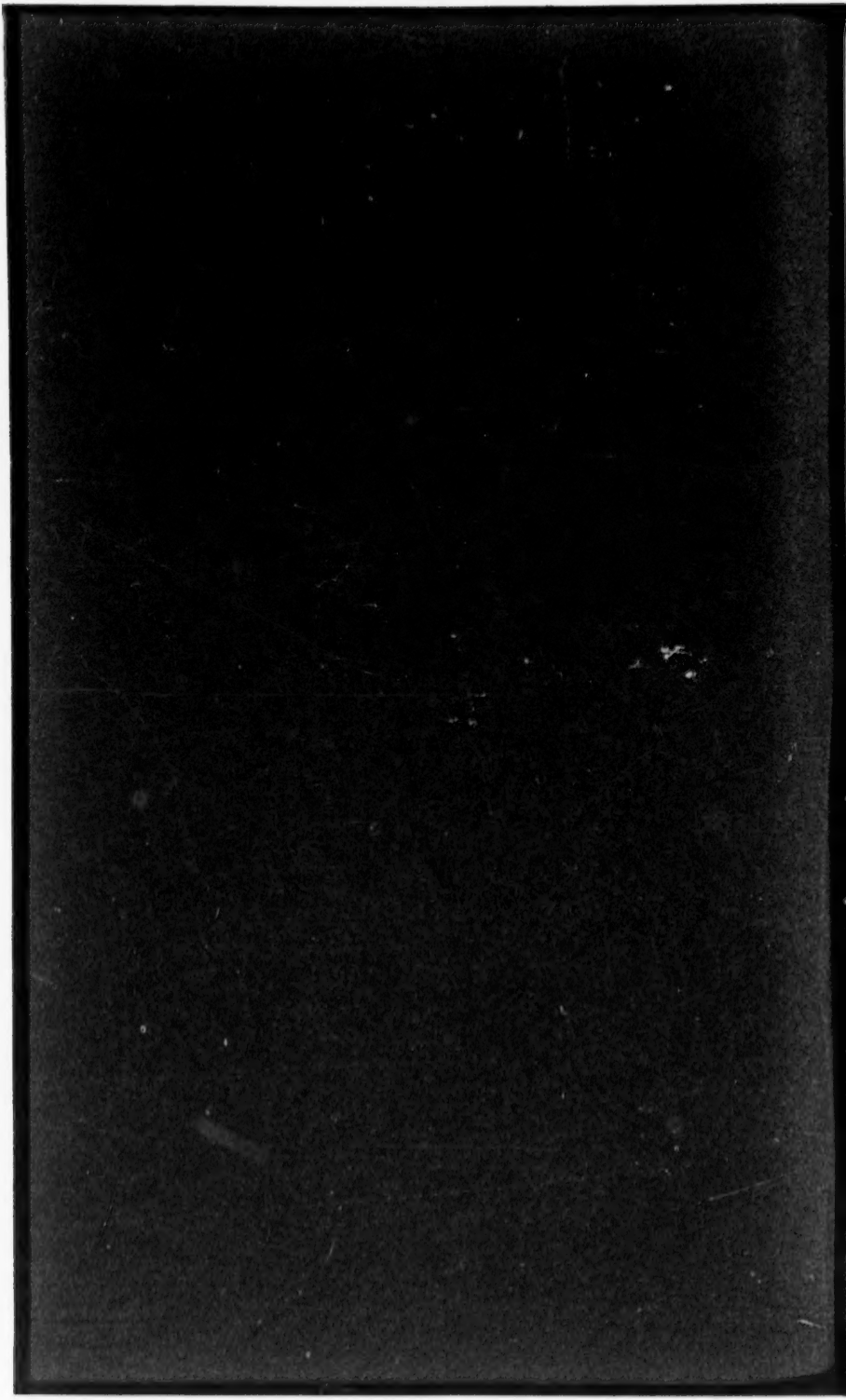

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 153

OLIN MATHIESON CHEMICAL CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Certiorari to the United States Court of Appeals for the Fourth Circuit to Review a Decree Enforcing an Order of the National Labor Relations Board

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REPLY BRIEF FOR PETITIONER

After reading the brief filed by the Board, Petitioner has noted that the Board's major arguments are premised upon such a serious misunderstanding of the record that Petitioner feels impelled to file a short reply memorandum to draw the attention of the Court to this aspect of the Board's position.

(1) When Strikers Returned on March 17 There Was Available to Them Only a Limited Number of Permanent Jobs and Hence No Mass Reinstatement Occurred.

The major fallacy in the Board's brief lies in its assumption that "petitioner reinstated the * * * strikers" who returned on March 17, and that, therefore, all strikers were reinstated on that date to permanent jobs (Br. 3).

In taking this position, the Board in its brief ignores, or attempts to minimize, a salient fact and the inescapable implications thereof. As stated in the Board's Statement of Facts (Br. 3): "Prior to the strike, petitioner had decided, for economic reasons, to lay off 94 maintenance employees". But the Board does not accept the necessary concomitant of that fact, i.e., that 94 of the maintenance jobs occupied on February 24 (the date the strike began) were not permanent, but temporary.

The Board attempts to minimize this fact by stating that, "As of the end of the strike, however, it [petitioner] had not yet selected the particular employees to be laid off" (Br. 3), and by pointing to the comment in petitioner's brief that, " . . . at the time the strikers returned to work, the Company had not as yet formally designated the positions in the maintenance unit which it intended to continue in its job structure, nor had it designated which positions it intended to eliminate" (Br. 20). But that is surely immaterial. It is true, of course, that the Company did not, early in February when it decided to eliminate 94 jobs, "formally" advise either the Unions or the employees of its decision. Further, the Company did not then immediately designate the particular employees who would be without jobs as a result of the elimination of 94 jobs.

Nevertheless, there is no escape from the fact that *when the Company decided to eliminate 94 jobs, 94 jobs immediately became temporary jobs the tenure of which depended upon the length of time it would take the Company to effectuate its decision.*

Some interval was necessary before this decision could be implemented by actually laying off employees. The method or formula at first depended upon the outcome of then current union negotiations. Once the strike began, Petitioner's intended force reduction became academic. Instead the Company was faced with the converse problem of staffing even the reduced number of available maintenance jobs. There is a reasonable inference that when the remaining strikers returned in a body, a period had to ensue before petitioner could determine how many and which of the strikers had returned and when the lay off should be made, in view of the backlog of maintenance work which accumulated during the strike.

The two week period which intervened until petitioner had its lay-off schedule ready does not seem to be more than a reasonable length of time for the purpose. The strike ran from February 24 until March 17 but as soon thereafter as returning strikers were sufficient in number to fill the permanent jobs and the temporary needs, the Company promptly performed the "formalities". By no reasonable process of thought can this short intervening period alter the effect of the fact that from early in February 94 maintenance jobs were strictly temporary in nature.

From the fact that there were 94 temporary jobs and 140 (234 minus 94) permanent jobs on February 24

when the strike began, it necessarily follows that there were exactly the same number of temporary and permanent jobs available during the strike and on March 17, when the remaining strikers returned. Hence, strikers who returned to work must be limited in their reinstatement rights to these jobs, temporary and permanent, because these were the only *available* jobs.

Some employees did not join the strike and still others returned to work while other strikers remained out. The Company assigned all the latter to permanent jobs, of which there was then a surplus, owing to the strike. When the remaining strikers returned *en masse* on March 17, they were assigned, in order of length of service, to as many permanent jobs as remained available, leaving 94 of the least senior of them for the 94 temporary jobs available. The Company's written proposal to the Unions regarding seniority was no more than an attempt to "formalize" this action, and was necessary to restrict a seniority provision of the proposed contract which would require the Company to rearrange the basis upon which it had distributed available work to returning strikers.

It may be contended that the Company's failure to inform the various striking employees, at the time of their return, of the permanent or temporary character of their job assignments constitutes a sort of waiver. The fallacy of this theory is apparent, however, when consideration is given to the Company's legal obligations to the strikers who returned while permanent job assignments were still available (referred to on pages 22-3 of our principal brief).

If the Company had "formally" assigned an employee who returned to work (during the strike) on

March 1, for example, to a temporary job, the Company would clearly have violated its affirmative obligation to reinstate a striker to permanent work which the striker was capable of doing and which was then available. It is true that the Company, without running afoul of the law, might have told the junior employees who returned to work during the strike that they would be assigned to temporary work and would be laid off when a sufficient work force of new replacements and senior returning strikers was gathered to man all the permanent work assignments. However, such a procedure would hardly have promoted petitioner's effort "to maintain business operations" during the strike (an effort which the Board concedes in its brief (p. 11) was proper under the *Mackay* doctrine) and would have left the Company open to the obvious suspicion that its action was taken to penalize the striker for his strike activity.[1]

(2) The Timing of the Announcement of Permanent Tenure Was Not Material.

The *Mackay* doctrine is that an employer has "the right to protect and continue his business by supplying places left vacant by strikers" and that subsequently returning strikers are not entitled to displace these replacements. In *Mackay*, the replacements were employees transferred by the employer from one of its other offices. In the present case, the replacements were strikers who had voluntarily abandoned the

[1] Had the Company refused to assign a permanent job to a non-striker while assigning such a job to a striker—particularly at the request of the Unions—it would be subject to a charge of discrimination against an employee because of his *refusal* to engage in strike activity. See *Anniston Yarn Mills, Inc.*, 103 NLRB 1495.

strike and crossed the picket line before the Unions ordered back all the remaining strikers without any strike settlement. Unless it is to be now concluded that a fundamental difference exists between voluntarily returning strikers and other replacements — and we submit there is no basis therefor — then there is no apparent reason why *Mackay* should not be here applicable. *Potlatch* so held.

Potlatch further held that it is immaterial that the employer, as here, did not announce that the replacements' tenure was permanent until the time of bargaining negotiations looking to settlement of the strike. ("The record here does not disclose that (the employer) in fact assured the replacements that their places might be permanent; however that assurance need not be proved." (189 F. 2d, p. 86). But in the present case the court below, rejecting *Potlatch*, held that it *was* material; that the replacements here were not entitled to permanent tenure because, *and only because*, "no promise *when they were employed*, was made . . . that their employment would be permanent" (RA 29). As the court interprets *Mackay*, the legality of the permanent tenure is conditioned upon the facts being such that the employer was under the "*necessity*" of making the advance promise in order to obtain the replacements so as "to keep its plant in operation" (id). Concluding that in the present case such necessity did not exist at the time the permanent tenure was announced, because then the remaining strikers had previously returned to work on orders of the Unions, the court enforced the Board's order. The Board in its brief (p. 17) concedes that an employer could not hope to obtain replacements "only for the duration of the strike" and that the balance between the economic

strikers' "risk of losing his job" and the employer's "risk of losing his business" by shut-down is tipped in favor of the employer by the law. Yet the Board contends that the decision was rightly based upon the ground that petitioner "never made any promise of preferred tenure in order to obtain a work force while the plant was struck" (Br. 17).

The whole decision of principle is thus related solely to the timing of the announcement. This is clearly an extremely narrow ground of decision. It fails to take into account the essential facts that petitioner *in fact required* the replacements (it had notified the Unions that on March 17th it would commence hiring new employees "for some of the jobs which were formerly filled by striking employees" — PA 22); that the replacements whose status is here in question *did in fact enable petitioner to keep the plant in operation;* that they had done everything necessary to be done on their part to qualify for permanent tenure; and finally that the Board itself concedes that if petitioner had made the advance promise of permanent tenure and had thereby successfully induced some of the strikers to cross the picket line, it would then have been open to a Board charge of unfair labor practice for illegal strike-breaking (Br. 21, foot-note). Surely all the substantial elements were here present upon which the replacements were entitled to permanent tenure. Even the Unions knew from petitioner's notice that it would hire permanent replacements, from which they knew or should have known that the replacements already obtained were permanent. But the court below held and the Board contends that one element and only one, was yet lacking, namely an advance promise by petitioner. Aside from the mani-

fest unfairness of thus requiring petitioner to place itself in jeopardy of one unfair labor practice in order to avoid another, it is surely clear that the mere timing of petitioner's announcement should not control the principle involved. The decisive point is that under the circumstances the replacements were of right entitled to the tenure.

The Board concedes that the protection of the right to strike "must necessarily be balanced against other competing legitimate interests." (Br. 15). But the Board in its brief considers only two of these, namely the employer and the remaining strikers. Yet there is a third such interest, i.e., the replacements, which the Board overlooks. They, too, have a "competing legitimate interest," and their right not to strike is as fully protected by the Act as the complainants' right to strike. They, too, must not be discriminated against because they have exercised that right (Sec. 7 of the Act). As pointed out in our principal brief (pages 22-4), they were entitled under the decisions to the status of permanent employees.

(3) The Unions Had Not Abandoned Their Demands When They Ordered the Remaining Strikers Back to Work and Were Free to Order Them Out Again at Any Time.

The Board contends that the employees had "abandoned the strike and returned to work" (Br. 24), that the strike was therefore "over". This argument ignores the fact that the remaining strikers did not voluntarily abandon the strike but returned in a body at the Unions' direction. It was the decision of the Unions, not of the individual employees.

The Unions were still in position to order them out again at any time. It is obvious that if petitioner had

replaced employees then at work with returning strikers and if then the Unions had again ordered out the same body of men, it could not have hoped for returning employees to keep the plant in operation. If, as the Board concedes, an employer "would have little or no chance" of hiring new employees for the duration of the strike only, the same would equally apply to former strikers who had before returned and had then been "bumped" when the remaining strikers had returned.

The Board argues that "nothing in the record suggests that the return of the full term strikers was merely a tactical maneuver and that the Unions contemplated resuming the strike." (Br. 23.) This is inaccurate because the Unions at the bargaining conference on April 2nd, more than two weeks after they had ordered the remaining strikers back, were still maintaining their demand for a wage increase, which was the issue upon which the strike was originally called. And on March 23d, the Unions had written a letter to petitioner containing what can only be construed as a threat to resume the strike unless petitioner met with them forthwith to discuss the strike issue. It cannot be gainsaid that they were free to do so.

It has been held that no obligation arises to make permanent reinstatements where a union letter sent to an employer prior to any strike settlement does not agree to an abandonment of the strike or contain an unconditional request for reinstatement, *U.S. Cold Storage Corp.*, 96 NLRB 1108, 1111, and an offer to return the strikers to work when coupled with union insistence upon resumption of negotiations, has been held as imposing no obligation upon an employer to

reinstate unfair labor practice strikers, *V-O Milling Co.*, 43 NLRB 347, 361.

That unions have employed the procedure of intermittent strikes is disclosed by the decisions. In *International Union* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 249, "this procedure was publicly described by the union leaders as a new technique for bringing pressure upon the employer". In *International Shoe Company*, 93 NLRB 970, 909, the union employed the same technique. It seems clear that petitioner, in giving permanent employment to the men who had demonstrated that they would stay on the job in spite of the unsettled demands of the Unions and the possibility of further strike calls, was taking a reasonable step in the exercise of its right "to protect and continue his business by supplying places left vacant by the strikers". The strike was not "over" in the sense that it could not be recommenced at any time, and, even on the Board's limited construction of the *Mackay* doctrine, petitioner was within its rights.

(4) Petitioner's Purpose Was Not to Reward Nor to Penalize.

The Board says (Br. 18) that it was petitioner's "*avowed* purpose to reward the 'loyal employees' and conversely to penalize the full term strikers and thus discourage future strikes". This is the Board's interpretation which we think the record does not support. The reference is to statements of petitioner's representatives quoted on pages 4-5 of the Board's brief.

As for the plant manager's statement that petitioner "owed these men an obligation for as much job security as possible", this is reasonably to be construed merely as a recognition of the rights to which the non-

strikers and returning strikers were entitled. The second statement, as reconstructed by a Board witness, was that petitioner's representative felt "that the ones that come across the picket line, etc., deserved a little—well, you might say a little something for helping support the breaking of the strike." If allowance is made for the obvious inexactness of this report of a statement made by the Company's attorney (RA 3), Mr. Kileen, at a collective bargaining conference, the word "deserved" should reasonably be interpreted as no more than a recognition of what these men were entitled to. And the statement that "many realize this plant was shut down before and they don't want to see that happen again", may reasonably be interpreted as referring to the danger of the Unions resuming the strike, if individual employees who had repudiated the strike were laid off to make room for the employees who reported back only upon union instructions.

Respectfully submitted,

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